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10 The Honorable Ricardo S. Martinez  
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12 UNITED STATES DISTRICT COURT  
13 WESTERN DISTRICT OF WASHINGTON AT SEATTLE  
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15 KENNETH FLEMING, JOHN DOE, R.K., and  
16 T.D.,

17 Plaintiffs,

18 v.

19 THE CORPORATION OF THE PRESIDENT  
20 OF THE CHURCH OF JESUS CHRIST OF  
21 LATTER-DAY SAINTS, a Utah corporation  
22 sole, a/d/a "MORMON CHURCH"; LDS  
23 SOCIAL SERVICES a/d/a LDS, a Utah  
24 corporation,  
25

26 Defendants.  
27  
28

29 NO. 04-2338 RSM  
30

31 DEFENDANT'S REPLY IN  
32 SUPPORT OF MOTION TO TAKE  
33 DEPOSITIONS AFTER  
34 DISCOVERY CUTOFF  
35

## I. INTRODUCTION

36 The facts underlying this motion are not disputed. Neither party completed discovery by  
37 the discovery cutoff. This was largely due to the October 2005 trial in which Plaintiff's counsel  
38 and defense counsel were engaged. Because of that conflict, each party identified additional  
39 depositions it wished to take after the discovery cutoff. Plaintiff has taken five depositions since  
40 the cutoff, and will take four more in the next month. By this motion, The Corporation of the  
41 President of the Church of Jesus Christ of Latter-Day Saints ("COP") seeks leave to take some  
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45 DEFENDANT'S REPLY IN SUPPORT OF MOTION TO TAKE  
DEPOSITIONS AFTER DISCOVERY CUTOFF - 1  
No. 04-2338 RSM

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1 depositions of its own. The only difference between Plaintiff and COP is that COP did not  
2 identify all witnesses it needed to depose prior to the cutoff.  
3

4 Plaintiff argues COP has not been diligent and that Plaintiff will be prejudiced—  
5 arguments not supported by the record or Plaintiff's brief. Unless one defines lack of diligence  
6 as not naming all desired deponents—notwithstanding all the *other* indicia of diligence—  
7 Plaintiff's rhetoric fails. As to prejudice, Plaintiff does not dispute that all the evidence sought  
8 by the depositions, as well as the documents that would be obtained through records depositions,  
9 will be offered at trial. Hence, neither the parties' strategy nor the evidence will change. The  
10 only thing that *will* change is the presentation of that evidence as the depositions will streamline  
11 testimony and potentially eliminate witnesses.  
12

13 Given Plaintiff is still taking depositions, the requested depositions will take minimal  
14 time, and the evidence obtained through the requested depositions will be offered at trial even if  
15 the depositions do not proceed, the Court should exercise its discretion to permit COP to take the  
16 depositions.  
17

18 **II. ARGUMENT**  
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20 **A. COP Has Been Diligent**  
21

22 Plaintiff's argument that COP has not been diligent collapses into a single point: COP  
23 did not identify the requested depositions prior to the discovery cutoff. This, however, does not  
24 equate to lack of diligence. The only difference between Plaintiff and Defendant on the subject  
25 of post-cutoff depositions is that Plaintiff identified a longer list of deponents initially. COP has  
26 been no less diligent than Plaintiff.  
27  
28

1           This case has been aggressively litigated and Plaintiff cannot seriously contend  
 2 otherwise. One need only look at the docket to assure oneself of that fact. COP has performed  
 3 all the pre-trial tasks characteristic of a fully litigated case. COP has:  
 4

- 5           • Propounded written discovery;
- 6           • Answered written discovery;
- 7           • Taken depositions of each of the four Plaintiffs;
- 8           • Taken depositions of other material witnesses;
- 9           • Retained and identified expert witnesses;
- 10          • Filed two major dispositive motions; and
- 11          • Engaged in mediation.<sup>1</sup>

12          In reality, Plaintiff seeks to penalize COP for initially exercising restraint in naming post-  
 13 cutoff deponents. Plaintiff has not, however, made the case that COP has lacked diligence in this  
 14 case.

#### 15          B. Plaintiff's Claim of Prejudice is Without Merit

16          Plaintiff's opposition makes a series of unsupported, meritless claims of prejudice. We  
 17 quote and address each one in turn.

##### 18          1. **"Plaintiff may very well have to engage in additional discovery simply to** **contradict the defendant's current position."**

19          This statement is completely unsupported. Plaintiff does not identify any "additional  
 20 discovery" they would need to undertake *because of* these depositions.

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21          1 Plaintiff's statement in footnote 26 of its opposition that COP has "refused" to mediate Plaintiff's claims is  
 22 perplexing and erroneous. The parties mediated all the plaintiffs' claims, which resulted in settlements with some  
 23 Plaintiffs but not Plaintiff R.K. COP's insistence on addressing each Plaintiff's case individually and on its merits is  
 24 not equivalent to refusal to mediate.

1 To the extent Plaintiff feels he needs to perform additional discovery, he will be doing it  
 2 whether or not the depositions occur. In fact, since Plaintiff knows that each of the proposed  
 3 deponents can be subpoenaed for trial, and the records subpoenaed as well, Plaintiff is likely  
 4 already engaged in informal discovery. For example, if he does not have them already, plaintiff  
 5 will surely obtain his school and employment records even if this Court denies COP's motion.  
 6 Plaintiff knows that COP will subpoena them for trial and he will want to see what they reveal.  
 7 Thus, the depositions will not cause Plaintiff to conduct any further discovery.

15       **2. Plaintiff will have to ask his damage expert, Jon Conte, Ph.D., to re-evaluate**  
 16       **his opinions and to issue a revised report.”**

18 Again, Plaintiff provides no explanation or support for this statement. Although COP can  
 19 only guess at Plaintiff's intended point, presumably Plaintiff is arguing the depositions of the  
 20 therapists would cause Mr. Conte to need to re-evaluate his report. This seems unlikely. Mr.  
 21 Conte already has the therapists' written reports, as does COP. COP primarily seeks to discover  
 22 who did the interviews of Plaintiff and to confirm Plaintiff made the statements attributed to him  
 23 in those reports. It is unlikely anything will come from these depositions that will cause  
 24 plaintiff's expert, who already has seen the therapists' opinions, to change his report.<sup>2</sup> Even if  
 25 such changes are needed, COP asks only that it be provided a copy of the amended report. COP  
 26 will not seek to re-depose him.

36       **3. Engaging in discovery will interfere with plaintiff's trial preparation.”**

38 Plaintiff claims he would need to stay in a “constant state of preparation, changing his  
 39 theories and strategies as new evidence is disclosed.” This is, at best, hyperbole. Nothing  
 40 revealed in these depositions will be news to Plaintiff. He presumably knows his employment

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44       <sup>2</sup> Indeed, if there was such a need for a change of opinion, one would think Plaintiff would want to know that in  
 45 advance of trial, rather than having to make such changes in the course of the trial.

1 and school history and, if he doesn't, he will be acquiring such information between now and  
 2 trial anyway. He knows what he told his therapists—he knows, for example, whether he told his  
 3 therapists his father hit him with a golf club and, thus, whether he lied or told the truth when he  
 4 testified in his deposition that it did not happen. He presumably knows what his father and  
 5 brother will say and, if he does not, he can simply ask them.  
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11 COP wants to take the depositions because it wants to know what these witnesses will  
 12 say. For understandable tactical reasons, plaintiff wants to deny COP the evidence in advance of  
 13 trial. However, these depositions will not cause either party to develop new theories or  
 14 strategies, or to alter trial preparation.  
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#### 19       4.     Plaintiff's Trial Conflict

20  
 21 COP has two responses to Plaintiff's argument that his counsel's upcoming trial leaves  
 22 no time for additional discovery.  
 23  
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25       First, if this motion is granted, defense counsel will schedule them at any time convenient  
 26 to Plaintiff's counsel and the witnesses—including after counsel's upcoming trial or, if  
 27 Plaintiff's counsel desires, on weekends between now and then. COP has committed to taking  
 28 each deposition in two hours or less, and given the records depositions will almost surely not  
 29 occur, they can all be completed in less than a day and a half.  
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35       Second, Plaintiff's counsel protests too much. They intend to take four additional  
 36 depositions in this case: one on July 28, and the other three on August 8 through 10. Second  
 37 Declaration of Charles C. Gordon, Exhibits 1, 2. Some of these depositions are out-of-state.  
 38  
 39 One of three conclusions can thus be drawn: Plaintiff's counsel does not believe their case will  
 40 actually go to trial; Plaintiff's counsel do not both plan to attend the whole trial; or, Plaintiff's  
 41 counsel intends to have others at the Gordon Thomas Honeywell firm handle the depositions  
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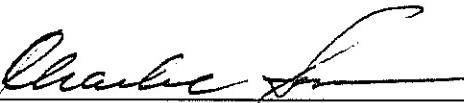
1 Plaintiff is taking. Whichever of these is applicable, Plaintiff's willingness to note depositions  
2 for the period immediately prior to and during the trial demonstrates the limited depositions  
3 sought by this motion will not be an obstacle to Plaintiff's trial preparation or counsel's  
4 participation in the other trial.  
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7 **III. CONCLUSION**

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9 For the reasons stated above and in COP's opening brief, this Court should grant COP's  
10 motion for leave to take the four records depositions and the five other depositions.  
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13 DATED this 14<sup>th</sup> day of July, 2006.  
14  
15

16 **GORDON MURRAY TILDEN LLP**  
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3                   **CERTIFICATE OF SERVICE**  
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7                   I hereby certify that on July 14, 2006, I electronically filed the foregoing with the Clerk  
8 of the Court using the CM/ECF system which will send notification of such filing to the  
9 following. The parties will additionally be served in the manner indicated.  
10  
11

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